R.D. #0012-05
Englewood, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

C&C METAL PRODUCTS CORP.
Employer

and **CASE 22-RC-12652**

UNITED STEEL, PAPERS AND FORESTRY RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC[1]
Petitioner

and

LOCAL 72, NATIONAL ORGANIZATION OF INDUSTRIAL TRADE UNIONS
Intervenor

DECISION AND ORDER

I. INTRODUCTION:

The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and regular part-time production and maintenance employees employed by the Employer at its Englewood, New Jersey facility. The Employer and the Intervenor both assert that the

[1] The name of the Petitioner appears as amended at the hearing.

petition should be dismissed as the Memorandum of Agreement for Contract Renewal (MOA) between them bars the petition here. The Petitioner appears to assert that the MOA should not bar the petition because it leaves unresolved certain terms that the parties are still negotiating and because the agreed upon terms were not implemented before the petition was filed.

I find, for the reasons described below, that the MOA between the Employer and the Intervenor is a bar to an election in this matter, and therefore, the petition must be dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,[2] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The labor organizations involved claim to represent certain employees of the Employer.[4]

Briefs filed by the Intervenor and the Petitioner have been considered. No other briefs were filed.

The Employer is engaged in metal stamping, zinc dye casting, wiring forming and finishing at its Englewood, Jersey facility, the only facility involved herein.

The parties stipulated and I find that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The Intervenor was permitted to intervene based on its expired collective bargaining agreement and the MOA, which covers the petitioned-for employees.

4. No question affecting commerce exists concerning the representation of certain employees of Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

II. FACTS

The Employer is in the metal works business at its facility in Englewood, New Jersey. The Employer recognized the Intervenor as the collective bargaining representative for a unit of production and maintenance employees in about 1999; the parties executed two collective bargaining agreements preceding the MOA. The most recent collective bargaining agreement (CBA) was effective January 1, 2002 to December 31, 2004. The Petitioner seeks to represent a unit identical to the one defined in the CBA, which currently consists of about 53 employees.

The MOA is a hand-written list of changes to the expired CBA that was prepared by Frederick Stewart, Intervenor's Third Vice President and Business Agent.[5] Stewart was responsible for administering the CBA and acted as the Intervenor's primary negotiator for the MOA.[6] Stewart testified that Employer managers Mitchell, Michael, Matt and Neill, whose last names he does not know, represented the Employer during the parties' four bargaining sessions.[7] It is undisputed that the MOA was signed at the fourth bargaining session on March 31, 2005. Stewart was not sure which two managers signed the MOA for the Employer, but thought it was Neill and

Stewart testified that such forms and memoranda are standard for renewal agreements.

Stewart was the only witness who testified at hearing. He was called to testify by the Intervenor. The Petitioner and the Employer were represented at the hearing by counsel, but they called no witnesses and introduced no other evidence.

The Intervenor introduced into evidence Stewart's bargaining notes for the parties' fourth bargaining session held on March 31, 2005, at which the MOA was signed. Stewart testified that he kept bargaining notes for the other sessions on a folder that was lost.

Matt. The signatures are not legible; the Petitioner did not attempt to identify them or attack their authenticity at hearing.

The MOA provides for a new three year agreement ending December 31, 2007 upon the same terms as the CBA, except for the following itemized changes: (1) a wage increase; (2) reduction in holidays and sick leave for new employees hired after April 1, 2005;[8] (3) new language for Health and Welfare coverage; and (4) removal of the 15-minute check cashing time and 15-minute afternoon break.

Although the MOA states in the section for "Health & Welfare Coverage" that the parties will "add no language to the CBA," the parties have not reached agreement regarding such language. The two outstanding issues were the interest rate that the Employer would pay upon any delinquency to the health and welfare fund and the arbitrator who would be designated to hear disputes between the Intervenor's fund and the Employer regarding health and welfare matters. The parties have discussed these issues since the MOA was signed, but have not executed a written agreement resolving them.[9] The MOA did not alter the health and welfare fund payments that the Employer was required to make or the benefits that employees received under the CBA. Since March 31, 2005, the Employer has made all such payments and employees have continued to receive their contractual health benefits.

[8] The MOA references an attached paper under the section title "Holidays," and a copy of the CBA provision regarding Holidays is attached. The attached provision contains hand written check marks next to five of the 12 holidays, and a written notation that states "for new hires after 4/1/05." The provision also contains notations made by Stewart that, according to him, reflect a schedule for new hires to obtain additional holidays after their second, third and fourth year of employment. However, it is unclear from Stewart's testimony whether those notations were present when the MOA was signed, or were added by him after the fact.

[9] Stewart testified that he last discussed the matter with manager Neill a little over a month before the hearing.

Stewart testified that he met with unit employees on the day that the MOA was signed and held a ratification vote at lunch time. Of the 16 employees who attended, five voted against the MOA. Accordingly, Stewart advised those employees present that the MOA reflected their new contract.

In opposing contract bar, the Petitioner contends that none of the terms and conditions of employment of the MOA was implemented before the petition was filed on September 22, 2005, including the wage increase. Indeed, the Employer and the Intervenor represented at hearing that the retroactive wage increase was not paid until early-October 2005. Stewart testified that the Union was unaware that the Employer had not implemented the wage increase until an employee called about three weeks before the hearing and advised him of that fact. Stewart testified that he immediately called the Employer's attorney and, following discussions back and forth, the Employer advised him that the raise would be implemented in a week or two.

Stewart testified that, to the best of his knowledge, the Employer implemented changes other the wage increase immediately after the MOA was signed. However, Stewart conceded that no new employees had yet experienced the eliminated holidays or sick leave that were reduced by the MOA and that the MOA did not substantively alter the Employer's health fund payments or the employees' health benefits. The record also contains no specific evidence or testimony indicating that employees are no longer receiving 15 minute breaks in the afternoon or for check cashing under the expired CBA.

III. Legal Analysis

The major objective of the Board's contract bar doctrine is to achieve a reasonable balance between the frequently conflicting aims of industrial stability and freedom of employees' choice. This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption and at the same time to afford the employees the opportunity, at reasonable times, to change or eliminate their bargaining representative, if they wish to do so. The initial burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park,* 187 NLRB 517 (1970).

The Board's contract bar rules are clear. To serve as a bar to an election, a contract must meet certain basic requirements; these requirements are set out in the Board's decision in *Appalachian Shale Products Co.,* 121 NLRB 1160 (1958). The contract must be written, signed by the parties, cover substantial terms and conditions of employment for the petitioned-for unit, be of definite duration and not exceed three years. Id. Further, it must "state with adequate precision the course of the bargaining relationship" so that "the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems." Id. at 1163. Ratification by the union membership is not a necessity for upholding a contract as a bar.

Here, I find that the Intervenor has met its initial burden by virtue of its signed written MOA with the Employer.[10] The MOA is of a definite three-year duration and contains substantial terms and conditions of employment. Although the parties have

[10] Although Stewart could not clearly identify the managers who signed the MOA on behalf of the Employer, the Petitioner has not contended that those signatures are invalid or not those of authorized Employer representatives. Accordingly, I find that the Employer signed the MOA for purposes of determining the issue of contract bar.

not executed an agreement regarding certain procedures for the handling of health coverage disputes, should they occur, the MOA does provide health and welfare fund payments that have been made by the Employer and employee health benefits that they have received. In all other respects, by incorporating the CBA, the MOA substantially resolves and stabilizes employees' wages, hours and other terms and conditions of employment. Thus, on its face, the MOA appears to bar the processing of the petition. [11] See *St. Mary's Hospital and Medical Center,* 317 NLRB 89 (1995); *USM Corp.,* 256 NLRB 996, fn. 18 (1981); *Gaylord Broadcasting Co.,* 250 NLRB 198 (1980).

The Petitioner observes that the wage increase was not implemented and that the MOA did not actually alter other terms before the petition was filed. However, Stewart did advise employees that the MOA reflected their new contract on the day it was signed, without any qualification that the MOA was contingent upon or subject to future negotiations. Further, the wage increase was to be retroactive effective January 1, 2005, no matter when it was implemented, and Stewart contacted the Employer to enforce the agreement as soon as he learned that it had not been paid. Thus, I find that this is not a situation where the union has abandoned the unit, become defunct or failed to explain why a new contract was not immediately enforced. [12] Cf. *Visitainer Corp.,* 237 NLRB 257 (1978).

[11] The Petitioner sites *Seton Medical Center*, 317 NLRB 87 (1995) for its contention that an incomplete agreement may not bar an election. However, in *Seton Medical Center,* the Board concluded that the parties written documents were "insufficient to bar the election ... not because the provisions were not sufficiently complete but because there is no signed writing specifying the overall terms of the contract." 317 NLRB at 88. Here, as in a companion case referenced by the Board in *Seton Medical Center,* the MOA constitutes such a writing and sufficiently defines the terms and conditions of employment to stabilize the parties' bargaining relationship, notwithstanding "the lack of a meeting of the minds on certain issues ...." *St. Mary's Hospital and Medical Center,* 317 NLRB 89 (1995).

[12] The Petitioner sites *Silver Lake Nursing Home,* 178 NLRB 478 (1969) for its contention that the MOA may not bar an election because certain provisions have not been enforced. I find that case distinguishable.

The record also contains no evidence that the parties otherwise ignored the MOA or continued to operate under the terms of the CBA by, for example, allowing employees to receive sick days, holidays or breaks that the MOA eliminated. Although Stewart testified that employees have not yet been affected by certain provisions of the new contract, it does not follow that the parties intended to ignore those provisions when applicable. Accordingly, under these circumstances, the terms and conditions of employment of employees appear to have remained fixed and stable pursuant to the parties' new agreement, and it would be inappropriate under the Board's contract bar principles to disturb them by processing the instant petition.

Based on the above and the record as a whole, I find that the collective bargaining agreement the Intervenor has with the Employer is a bar to an election in this matter as it charts with adequate precision the course of the relationship between the parties and substantial defines the terms and conditions of employment of unit employees.

IV. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations

In *Silver Lake Nursing Home*, deviations between the contract and employees' actual terms and conditions of employment were far more extensive than the wage increase at issue here. Further, unlike here, the intervening union in *Silver Lake Nursing Home* admitted that it refrained from enforcing certain provisions while the Employer was "getting on its feet," and the Employer's administrator testified that he did not see the intervenor's contract until the hearing.

Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **November 4, 2005.**

Signed at Newark, New Jersey this 21st day of October, 2005.

Gary T. Kendellen, Regional Director
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